In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM SAMUEL BIGBY, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 111.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was commenced in the court below upon a claim against the United States set forth in the petition to the effect: That the claimant on or about November 27, 1899, at the request of duly authorized agents of the United States, who were acting at the time within the scope of their authority, entered into a passenger elevator in the United States court-house and post-office building in the city of Brooklyn, the elevator being designed and intended by the United States for the use of persons on their way to the office of the marshal of the United States for the eastern district of New York, and the petitioner entering the

elevator, as aforesaid, while on his way to the said marshal's office on official business; that the United States then and there entered into an implied contract with the petitioner to carry the petitioner safely, for a sufficient valuable consideration, and to operate said elevator with due care and to employ for the operation of said elevator a competent and experienced person; that the United States, in violation of said contract, failed to carry petitioner safely and to operate said elevator with due care, and failed to employ for the operation and in charge of the elevator a competent and experienced person; that by reason of the failure of the United States in these respects, and because of the incompetence and inexperience of the person engaged in operating said elevator in charge of same, and in consequence of the said violation of the United States of its said contract, the petitioner was severely injured and caused much bodily and mental pain, to his damage $10,000.

The petition was demurred to upon the ground that the court had not jurisdiction either of the person or of the subject of the action, and also upon the ground that the petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained in the following terms:

> It is ordered that said demurrer be and is hereby sustained on all of the grounds aforesaid, and so far as it is sustained upon the ground that it does not state a cause of action, it is so sustained because such a cause of action as is stated in the petition is not authorized to

be maintained against the United States by the Tucker Act, namely, chapter 359 of the acts of the second session of the Forty-ninth Congress, approved March 3, 1887. (Record, p. 8.)

Thereafter the case was sent to this court on a writ of error, pursuant to section 5 of the act of March 3, 1891, providing for circuit courts of appeals, etc. The court certified that the jurisdiction of the court was in issue, and stated the issue to be as follows:

> The question whether a person who is not, and has not been, an employee of the United States, can sue the United States in the circuit court of the United States, in the district where he resides, to recover damages to the amount of $10,000, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid was being carried on an elevator in a public building, owned and used by the United States as a post-office and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business. (Record, p. 16.)

Accordingly there is now before this court only the question of the jurisdiction of the circuit court in which the action was brought. This jurisdiction is to be found, if at all, in the provisions of the Tucker Act, giving to the Court of Claims jurisdiction to hear and determine the following matters:

> All claims founded * * * upon any contract, expressed or implied, with the Government

> of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States in a court of law, equity, or admiralty in the United States, were suable;

and providing—

> That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.

As the action, if sustained, must be rested solely on the foregoing statutory provisions, it would seem that the initial allegation of the complaint: "I. The United States of America is a corporation created by the Constitution of the United States, with its principal office in the city of Washington and the District of Columbia; and your petitioner alleges upon information and belief that within the meaning of the definitions of the New York Code of Civil Procedure said United States of America is a foreign corporation," although apparently made as bearing upon the jurisdiction of the court, is really but an embellishment of the petition, and in this light calls for nothing further than this polite allusion thereto.

ARGUMENT.

Judge Thomas, in delivering the opinion of the court below, held that the recitals of the petition set forth no implied contract on the part of the defendant, but merely a violation of the duty of the United States to use ordinary care in conveying the petitioner upon its elevator, which breach of duty was culpable negligence, and therefore a tort; that the duty of the United States in the premises arose out of no contractual relation between the petitioner and the United States, but was imposed by law, and that for these reasons the claim could not be brought within the meaning of the term "implied contract," as found in the Tucker Act. It would seem from a consideration of the facts in this case, as they appear in the record, that there could be no question of the soundness of the conclusions reached by the court below, and as the contention of the claimant is by no means a novel one here, I feel that any further discussion of the case must be but a matter of weariness to the court. But counsel for claimant has insisted upon his contention that the petition in this case sets forth an implied contract within the meaning of the Tucker Act with such apparent seriousness and conviction that, at the risk above suggested, I shall further pursue this threadbare subject.

The primary error in the argument of counsel consists in underestimating the gravity of the question of jurisdiction involved in this case, and in treating the same as though it were merely a question of pleading in a court whose jurisdiction was unquestioned. And

here it seems pertinent to take up the doctrine of implied contract in what seems to be the more enlightened modern view, which is that the true implied contract arises out of certain facts which, when proven, evidence a contract as effectually as though it had been made in express terms—a contract founded upon the undoubted intention of the parties. An instance of this is the implied contract arising out of calling a physician or using the carriage of a liveryman without any express agreement as to compensation. But as to contracts described as *implied in law*, it can not be truly said that there is any contract, since there is no evidence of any intention of contract, but on the contrary the facts, when established, show that no intention to contract existed. Such contracts seem to be properly designated by the term "quasi contract." An illustration is the so-called implied contract of one who has obtained the money or property of another through some imposition or deceit or by the commission of a trespass. In all such cases the contract can not be said to be a true one, but is in reality a legal fiction resorted to under the ancient practice, in order that an action might be thus maintained upon a cause of action which could not be pleaded as an express contract, nor sued upon under any of the forms of tort actions then provided for. In actions thus brought the tort of the defendant out of which his liability really arose was waived, and he was sued upon an alleged contract said to be implied in law, which manifestly never existed, but which, nevertheless, he was not permitted to deny.

1460

This subject is ably discussed in Keener on Quasi-Contracts. The following authorities also point out very clearly the distinction between genuine and fictional implied contracts:

> The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued in assumpsit and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding.
>
> *Wood* v. *Ayres*, 39 Mich., p. 350.

In the above case the court quotes, with approval, from *Hertzog* v. *Hertzog* (29 Penna. State, 465), the following:

> There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances, as really existing, and then the contract, thus ascertained, is called an implied one. * * * But Blackstone introduces this thought about reason and justice dictating contracts in order to embrace, under his definition of an implied contract, another large class of relations which involve no intention to contract at all, though they may be treated as

> if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law, or statute law, impose upon anyone a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus, out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*. * * *
>
> The latter class are merely *constructive* contracts, whilst the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

In Metcalf on Contracts (p. 9), such contracts are spoken of as follows:

> In these instances, it is manifestly only by a fiction that a contract or promise is implied. And, indeed, the whole doctrine of implied contracts, in all their varieties, seems to be merely artificial and imaginary. But in the present state of the law, it is necessary, for the sake of legal conformity, to adopt this phraseology. In a great majority of cases which

> occur under this head, there is, in England, no safe legal remedy, except the action of assumpsit, in which a promise and the breach thereof are required to be alleged, although the defendant made no promise, but always denied his liability, and expressly refused either to pay or to promise payment.

In Pomeroy on Remedies reference is made on page 637 to this class of implied contracts as follows:

> When the contract relied upon is implied, and is simply a fictitious promise which the law infers from the tortious acts themselves.
> * * *
>
> But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*.
>
> *Milford* vs. *Commonwealth*, 144 Mass., 65.

Now, in the light of the foregoing, taking the phrase "implied contract," found in the jurisdictional statute in connection with the accompanying provision excluding claims "sounding in tort," it is difficult to see how the term can be held to refer to any other than the first class of implied contract above referred to, to wit, a genuine contract arising with certainty out of proven facts, or how it can be construed to have reference to the other class of so-called contracts implied by law, through resort to a fiction in which the wrong out of which the claim had its real origin is ignored. By

thus limiting the application of the words "implied contract," the intention of Congress to permit suit against the Government on claims sounding in contract, but to shut out from that privilege claims sounding in tort will incontestably be carried out, whereas if the construction contended for by claimant be adopted, that intention will be as unmistakably thwarted. In that event, as said by the Court of Claims, "The jurisdiction of this court will be as broad as the manifold grievances complained of against the officers and agents of the United States." (*McArthur* v. *The United States*, 29 C. Cls. R., 194.)

For, take the facts of this claim: They establish the clearest case of negligence. If the statute gave express jurisdiction of actions sounding in tort, the court would have unquestioned jurisdiction of this action, and yet the claimant insists that it should have an equally clear field under a statute declaring precisely the contrary. And this remarkable contention is to be sustained through the legerdemain of pleading in which the negligence, the tort, is not only to be waived, but, like Bottum, to be *translated* into an implied contract as unimpeachable as the best. The wolf is to be disguised in the fleece of a discreet petition, and thus the wool to be effectually pulled over the eyes of the court. But the decisions of this court and of the Court of Claims are not favorable to this proposition.

> But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible

for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

* * * * *

The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

* * * * *

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.

Gibbons v. *The United States*, 8 Wall., 274–5–6.

The Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers

or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.

Robertson v. *Sichel*, 127 U. S., 515.

It is a well-settled rule of law that the Government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress.

German Bank v. *United States*, 148 U. S., 579.

The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect between contract and tort, be evaded by framing the claim as upon an implied contract.

Hill v. *The United States*, 149 U. S., 598.

There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

* * * * *

This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become

us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

Langford v. *The United States*, 101 U. S., 345.

Schillinger v. *United States*, 155 U. S., 163.

It will be seen that the act of March limits the jurisdiction of the court to cases "not sounding in tort." The case which the claimant makes by his petition, and as shown by the findings, clearly indicates every element of a civil injury to the alleged right of claimant, for which at common law he would have to sue in a form *ex delicto*. Whenever the alleged cause of action arises out of the fault of the defendants, or from their negligence as distinguished from their obligations, undertakings, or contracts, it may be said that the action "sounds in tort," and the courts are prohibited from assuming jurisdiction in such cases.

Lanman v. *United States*, 27 C. Cls. R., 265.

The term used in the statute, "not sounding in tort," was intended to prevent this court from adopting the legal theory of cases in which it has been held by other courts that by the election of the aggrieved party the character of the proceeding may be changed from an action *ex delicto* to an action *ex contractu*. This court has had occasion to distinguish between cases sounding in tort and cases arising on contract.

* * * * *

> The term "sounding in tort," as used in the act of 1887, is the key that unlocks the issue as presented by the averments of the petition and the demurrer. If the alleged cause of action does not arise from a contract, either expressed or implied, or upon some of the other clauses of the statute, then, whatever may have been the negligence of the United States and the consequent damage to the claimants, they are without remedy. The authorities are abundant to the effect that at common law the claimants would have to adopt the action of case, which, aside from its enlargement in the action of assumpsit, is an action *ex delicto*.
>
> *McArthur* v. *United States*, 29 C. Cls. R., 194-195.

There was no contract of any sort.

The liability of defendant rests solely on its legal duty.

But it is also insisted that the relations of the parties had their origin in contract—the contract to carry safely of a common carrier—and that the negligence of the defendant, instead of being the gravamen of the action, constituted merely a breach of that contract. I have carefully examined the various decisions cited by counsel to support this view of the case, and in every instance it appears that there was an unquestioned contract of a common or a special carrier existing between the parties, into which the court imported, with more or less hesitation, as an implied element of that contract, the duty to carry safely, which is imposed by the general law. But these authorities have no proper appli-

cation to the present case. To begin with, the vital question of jurisdiction was not involved in any of these cases, but merely a question of technical pleading. But what is more to the point, this is not an analogous case upon the facts. The defendant in this case was not in the relation of a common carrier by reason of running its elevator, but simply rested under a duty imposed by law to carry passengers in safety.

McGrell v. *Buffalo Office Building Company*, 153 N.Y., 268.

Allen v. *Sackrider*, 37 New York, 342–343.

In this case the court says that the employment of a common carrier is a public one, and he assumes a public duty and is bound to receive and carry the goods of anyone who offers. Quoting: "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such manner as to render him liable to an action if he should refuse to carry for anyone who wished to employ him." (2 Pars. on Cont., 5th ed., 166, note.)

In *Nolton* v. *Western Railroad Corporation* (15 New York, 444), the complainant was a United States mail carrier and was carried by the defendant pursuant to a contract between the United States and the defendant. In an action brought for injury to the claimant by the negligence of the defendant the court said:

> It is difficult to see, however, how there can be a contract to transport safely where there is

no contract to transport at all. My conclusion therefore is, that this action can not be maintained upon the basis of a contract express or implied.

It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon everyone who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. * * *

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially in its nature from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway and carelessly leaves it uncovered at night, to the injury of some traveler upon the road. It is true, it may be said, that in these cases the duty is to the public, while in the present case, if it exists at all, it is to the individual; but the basis of the liability is the same in both cases, viz, the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no obligation to use care, as where a man digs a pit upon his own land and carelessly leaves it open affords no ground of action. But where there is anything in the circumstances to create a duty,

either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The case of *Marker* v. *Mitchell* (54 Fed. Rep., 638), cited by claimant, is in harmony with the above. It does not hold that the proprietor of a passenger elevator is a common carrier, but simply that he rests under the same liability as regards the safety of his passengers. This liability, of course, is the duty imposed by law without reference to contract.

But as stated by the court below, the true relation of the parties was that the United States extended to the petitioner for the purpose of transacting business with its officials a license to enter its building and to use in connection therewith the facilities in passing from floor to floor, these facilities including the elevator, as well as the floors, stairs, etc.; that this permission imposed upon the Government the duty to use ordinary care that the facilities offered to its licensees should be in a state of reasonable safety, abuse of which duty would constitute culpable negligence, upon which an action in tort only could be predicated and maintained. (Rec., p. 7.)

This is the undoubted rule of law where, as in this case, there is no contract of carriage, and seems to be the better rule even where the action is against the common carrier and there is the usual contract of carriage subsisting between the parties; the courts preferring to rest the liability of the carrier upon his undoubted legal duty to the public rather than to

make that duty by implication a part of the contract of carriage.

> The grâvamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. In *Bretherton* v. *Wood* (3 Brod. & Bing., 54), which was an action brought against ten defendants as proprietors of a coach for injuries sustained by the plaintiff, a passenger, in consequence of negligent driving, the jury found a verdict against eight of the defendants and in favor of the other two. On error the judgment was affirmed, and Dallas, C. J., said: "If it were true that the present action is founded on contract, so that to support it a contract must have been proved, the objection would deserve consideration. But we are of opinion that the action is not so founded, and that on the trial it could not have been necessary to show that there was any contract; and, therefore, that the objection fails. The action is on the case, against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to convey

14600

and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." And in *Philadelphia and Reading R. R. Co.* v. *Derby* (14 How. U. S., 483), Grier, J., speaking of the duty of a common carrier, says: "This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous." * * *

The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract.

Carroll v. *Staten Island R. R. Co.*, 58 N. Y., 133–4–5.

The company was in 1861 a common carrier, over its road, of passengers and their baggage and of goods and merchandise. As such carrier its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage and their baggage, and as a carrier of goods to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which they were destined or the termination of the

road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

Hannibal R. R. v. *Swift*, 12 Wall., 270.

It seems to me that the whole current of authorities, beginning with *Govett* v. *Radnige* and ending with *Pozzi* v. *Shipton*, establishes that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company, as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, "Writ de Trespass sur le Case," where it is said: (*b*) "If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."

Marshall v. *York, etc., Ry. Co.*, 11 C. B. R., 663.

See opinion of Blackburn, Justice, in *Austin* v. *Great Western Ry. Co.*, L. R., 2; Q. B. C., 445–6.

The foregoing authorities clearly establish that in every case in which one undertakes to carry passengers there is imposed upon him by law a duty to convey such passengers safely, and this without respect to the manner in which the undertaking is assumed, whether

by contract for hire, or gratuitously, or by reason of a mere license extended to the passenger; but such legal liability does not in itself constitute nor imply a contract. The authorities cited by counsel for claimant do not controvert this, but simply hold that where there is a contract for such carriage this legal duty may be considered an implied part of such contract. But counsel for claimant would reverse this doctrine and imply the contract from the duty.

The claimant relies upon the cases of *United States* v. *State National Bank* (96 U. S., 30), and *Swift Company* v. *United States* (111 U. S., 22), but the distinction between those cases and the present claim is very marked. The case of *United States* v. *State National Bank* is thus summarized in the syllabus:

> 1. Where a trust fund has been perverted, the *cestui que trust* can follow it at law as far as it can be traced.
>
> 2. The United States can not, against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent.
>
> 3. The rules of law applicable to an individual in a like case apply also to the United States. Its sovereignty is in no wise involved.

The case of *Swift Company* v. *United States* decides that a certain payment made by the company to the Commissioner of Internal Revenue was not paid voluntarily and therefore might be recovered, the same having been illegally exacted as a fee or tax to which the Government was in no wise entitled.

The most that can be said of these cases is that they permit suit against the United States on an implied contract to refund money which has found its way into the Treasury of the United States without legal warrant and upon which the Government has no sort of claim, but it can not be said that they establish a general principle. This is shown by the fact that in the cases of *Langford* v. *United States*, *Hill* v. *United States*, and *Schillinger* v. *United States*, *supra*, and other similar cases, where not money but other property of the claimants had been wrongfully taken and used by the United States, the claimants were held without remedy in the courts of the United States because of the provisions of the jurisdictional statute. Surely if there is no implied contract within the meaning of the statute where the property of an individual has been wrongfully taken and retained by the United States to its benefit, there can be no such contract implied where the United States has received no benefit from the wrongful act of its agent, but the demand is purely for damages sustained by reason of such wrongful act.

CLAIMANT'S PROPER RECOURSE IS TO CONGRESS.

Claimant's counsel points to the fact that on certain occasions Congress has granted relief to parties who have suffered damage in a manner analogous to the case of the claimant, as a basis for his contention that the jurisdictional statute under consideration should receive a very liberal construction. On the contrary, these facts simply indicate the proper course for the claimant to have pursued in the presentation of his

claim. Congress has not seen fit to give its courts jurisdiction of an action founded upon claims of this character, but has reserved to itself the determination thereof. Hence the claimant is not without remedy, but is in the wrong forum.

Gibbons v. *United States* and *German Bank* v. *United States, supra.*

It is respectfully insisted that the action of the court below in determining the jurisdictional question in this case against the claimant was correct and should be sustained.

LOUIS A. PRADT,
Assistant Attorney-General.

()